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PARTNERSHIP FOR ECONOMIC GROWTH

DECENTRALIZATION, INTERNAL BARRIERS TO TRADE,  
AND LOCAL DISCRIMINATORY ACTION

BY

GARY GOODPASTER,\* FEBRUARY 25, 2000

***Introduction***

Countries that devolve governmental authority away from the national government and toward local governments usually limit the ability of local governments to interfere with national goals and activities. National goals include national economic policy, harmony among political subdivisions, and protection of the rights of citizenship relating to the mobility of citizens within the nation. While governmental authority may be decentralized, nation-states view their internal economies as integrated, as internal free trade unions, as it were, and do not allow regional and local governments to restrict or interfere with internal or international trade. Similarly, citizenship in a nation-state should confer on citizens certain rights to move freely within the country, to take up residence in new places, and to be gainfully employed wherever they may live in the country, whether or not living in their place of birth or origin. Citizenship in the country cannot have much domestic meaning if localities can discriminate against non-local citizens.

Last year Indonesia adopted two laws concerning decentralization. Law No. 18 involves fiscal decentralization, and Law No. 22 involves decentralization of governmental authority. While many implementation details await the promulgation of regulations, the new laws will entail many changes in the ways in which Indonesia has been governed. Even before implementation, however, it is possible to foresee some serious problems, not adequately addressed in the decentralization laws, that will arise.

The ideas of decentralization and increased local autonomy follow the well-accepted and benign principle of bringing government closer to the people. The move, one hopes, will make governments more responsive and accountable. Nonetheless, increasing local legislative and executive law making authority means a proliferation of differing laws and regulations across kabupatens and regions. Mere differences in laws are not generally matters of concern – except in those areas where laws should be uniform across the country or where local laws interfere with some national interest.

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Likely no one would claim that a kabupaten or region should have its own foreign policy, nor that they should raise armies and navies.

The national economy, domestic and international trade, and the equality of citizens wherever they may be in Indonesia are, just as foreign policy or military affairs, matters of national interest. As a nation state, Indonesia and all its islands should constitute an internal free trade union. This is not the place to repeat the arguments about the value of free trade or trade liberalization. But everything that can be said about the benefits of free trade between nations applies even more strongly to free trade within a nation. Of equal and perhaps greater importance, internal trade barriers and local discriminations against citizens operate to destroy the integrity and solidarity of a nation. In decentralizing, Indonesia must take care that local autonomy does not weaken nationhood.

With decentralization, there is, however, a substantial risk that local interests, through enactments of laws or through local executive action, may trump national interests. These are areas where the center must retain the authority to control or revise the actions of the periphery. This can be done either through decentralization law provisions that deny localities the authority to take action in these areas or through a reserved right of the central government to invalidate local action. It is difficult to anticipate in advance all of the ways in which local legislation or executive action may interfere with national interests. Furthermore, the very idea of local autonomy argues for greater, rather than lesser, local legislative and executive powers. For these reasons, the central government should reserve to itself the authority to undo local actions whenever they demonstrably injure clear national interests.

Law No. 22 on Decentralization does have some provisions defining what governance authorities are given to regional authorities and what are retained by the central government. Article 7 (1) provides that “Kewenangan Daerah mencakup kewenangan dalam seluruh bidang pemerintahan, kecuali kewenangan dalam bidang politik luar negeri, pertahanan keamanan, peradilan, moneter dan fiskal, agama, serta kewenangan bidang lain.” Article 7 (2) provides:

Kewenangan bidang lain, sebagaimana dimaksud pada ayat (1), meliputi kebijakan tentang perencanaan nasional dan pengendalian pembangunan nasional secara makro, dana perimbangan keuangan, sistem administrasi negara dan lembaga perekonomian negara, pembinaan dan pemberdayaan sumber daya manusia, pendayagunaan sumber daya alam serta teknologi tinggi yang strategis, konservasi, dan standardisasi nasional.

If my reading of the Bahasa Indonesia is correct, regional authorities are tasked to carry out the national government’s general governance policies in the listed areas. It is not clear what these policies may be, and some may yet have to be developed; but at least Article 7 effectively reserves some national power in matters of national concern. Internal trade and local treatment of non-local citizens are matters of national concern, and the national government can articulate governance policies in these areas which regional governments must carry out and enforce. The national government, however, has not yet

articulated internal trade or citizen treatment policies. Nevertheless, there are signs that regional governments are swiftly taking the autonomy initiative and beginning to take inimical actions that may be difficult to redress later on. The closure of the Newmount mine in Sulawesi over a local tax dispute is a clear example. Further examples appear in recent newspaper reports. One alleged that local authorities in Semarang refused to allow a shipment of sugar to unload on the grounds that central Java was already sufficiently supplied with sugar. Another report alleged that regions might seek to impose license taxes on vehicles licensed in other regions.

Fortunately for Indonesia, the local autonomy experience of other countries makes it possible to predict with accuracy the specific kinds of problems likely to arise. As a federal state<sup>1</sup>, the United States has an extremely well developed law, or jurisprudence, regarding local interference with domestic trade and regarding local discriminations against citizens. For the most part, the United States treats these issues as matters of constitutional law. Indeed, they are, for they ultimately deal with the very constitution of the state, with power arrangements between governments, with the separation of powers between governments in the nation, and with the rights of citizens. All these matters fall under what is called “dormant Commerce Clause” jurisprudence. The Supreme Court of the United States, and lower federal courts, have taken on the responsibility of insuring that the union of states remains a free trade union and that citizens of one state in the United States are treated with equality and fairness when they undertake business or sojourns in other states.

The following brief review summarizes major parts of dormant Commerce Clause jurisprudence as it appears relevant to Indonesia. Indonesia may find it useful to consider some of the rules developed there. Then, with necessary changes reflecting Indonesia’s experience and concerns, it may adopt its own relevant policy rules, or mechanisms for resolving problems as they arise, regarding national trade and decentralized authority. Of one thing Indonesia may be certain, however, is that the kinds of problems described below will arise, and that the country needs to have some means of dealing with them.

## I

### **Trade Rules**

One major rule determining the relationship between the center and states or regions is that regions may not discriminate against interregional trade. Local units of government must treat all trade, whether originating within their boundaries or outside, evenhandedly. A second general rule is that even where a region does not discriminate against interregional commerce, it may not adopt laws that place a significant burden on

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<sup>1</sup> For the purposes of this article, it is irrelevant that Indonesia is not a federal state. Federalism is a name given to a certain arrangement of governmental powers as between the center and the periphery. In choosing to decentralize governmental authority and power, Indonesia is empowering local governmental institutions to act, over a range of matters, independently of the center. That is the commonality between federal state arrangements and Indonesia’s decentralization, and federal state experience is therefore relevant to Indonesia.

such trade. Regions, of course, do have the authority to enact health, welfare, and safety laws, but when such laws damage interregional trade, the benefits gained from them must justify the burden placed on trade. Suppose, for example, that in the interests of traffic safety, a region adopted a law that required all vehicles to have eight rear stoplights. While there might be incremental safety benefits deriving from such a law, other regions might adopt dissimilar laws. In that case, vehicles driving from one region to another would be subjected to different safety requirements and unjustified costs – unjustified in the sense the incremental safety benefits are but marginal – and such a law should not stand.

*Local economic protectionism.* Discrimination against out-of-region businesses should be presumptively illegal. An anti-discrimination rule would require that, in terms of their trade, regions should treat out-of-region businesses evenhandedly with in-region businesses. In Indonesia, there is good evidence that local governments have created local monopolies and monopsonies, and that they have imposed interregional trade quotas. The effect of such actions is to favor particular businesses and traders over others, to lessen competition, and to injure consumers. *Example:* A regional law or practice that prohibits out-of-region parties from buying at local fresh fish markets.<sup>2</sup> Such action favors local buyers over others, limits competition, facilitates buyer collusion, and may result in lower prices to fisherman and higher prices to fish consumers. Another well-known example involves oranges. In 1991, the Governor of West Kalimantan issued a decree that, in effect, required all oranges destined for inter-island trade to be sold to PT Bima Citra Mandiri. The effects on trade were disastrous; farm prices for oranges dropped substantially and exports fell by 63%. Consumers as a whole were also obviously worse off.

As the above examples suggest, localities should not, through regulation of trade or commerce, protect in-region economic interests from out-of-region competition. Laws that expressly single out interregional trade for disparate and negative treatment should be unacceptable nationally.<sup>3</sup> Sometimes laws adopted for ostensible so-called “police power” reasons actually mask efforts to injure out-of-region trade or traders. While regions should be able to enact laws that protect or further health, safety, and social welfare interests, they should seek to do so in ways that do not discriminate against or burden interregional commerce. Furthermore, there are often ways to advance health, safety, and welfare interests without injuring trade or commerce. Where possible, there should be every effort to do so. There may be an exception to this rule favoring commerce where the region can demonstrate that: 1) interregional commerce is the source of the problem that the region seeks to correct; and 2) that there are no nondiscriminatory ways available to protect local interests.<sup>4</sup> For example, suppose that a

<sup>2</sup> Compare *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

<sup>3</sup> *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (Oklahoma statute requiring in-region coal-fired power-generating plants to purchase from in-region producers ten percent of coal used to produce power invalid on its face).

<sup>4</sup> *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (ban on disposal, within-region, of waste originating out-of-region, invalid; no showing of any reason, apart from origin, for treating the kinds of waste differently); *Chemical Waste Management v. Hunt*, 504 U.S. 334 (1992) (fee imposed on hazardous waste originating out-of-region, but not in-region, invalid); *Fort Gratiot Sanitary Landfill v. Michigan Dept. of*

region can prove that a natural fertilizer product imported into the region from another region contains a harmful parasite. In such a case, even though a ban on the harmful fertilizer may help local fertilizer producers, the ban targets the exact problem and does not have a protectionist motive.

For this reason, regions should be able to enact quarantines singling out interregional trade in specific goods for special treatment, or even banning trade in them altogether, if the trade is the source of a real and significant harm that cannot be remedied otherwise.<sup>5</sup>

*Nonapparent discrimination.* Some regional actions that, superficially, appear not to discriminate against interregional trade may nonetheless implicate national economic concerns. This would occur, for instance, when a local government authorized a ban on both in-region and out-of-region commerce to a locality. The simple fact that a law proscribes both local and interregional commerce, and thus appears to treat them evenhandedly, does not mean it is necessarily valid. The effect of such a law is to limit trade and thus injure the national economy. While such bans do not single out interregional trade or commerce for special treatment, they clearly burden it nonetheless. In addition, such bans could disguise efforts to circumvent policies aimed at national economic union.

*Discriminatory effect.* Regional statutes or regulations that do not, on their face, discriminate against interregional commerce may nonetheless operate to single out interregional commerce for disadvantageous treatment or otherwise differentially impose burdens on it. Regional regulation having such discriminatory effects should be upheld only if legitimate, nonprotectionist interests justify the regulation, and there are no reasonable nondiscriminatory alternatives available to further the region interests.<sup>6</sup>

*Example:* A city passes an ordinance, in the alleged interests of health and safety, barring the sale of pasteurized milk unless it has been processed and bottled at an approved plant located within five miles of the city center. The city could serve its interests in wholesome, safe milk by inspecting plants outside the defined radius or by requiring that all milk sold in the city meet certain uniform standards. The law should therefore be thought of as an illegal discrimination against interregional commerce.

A more familiar Indonesian example involves tea-processing. In West Java, the Nusamba Company built four tea-processing factories even though there was already excess tea-processing capacity in West Java. To secure fresh tea leaves, Nusamba persuaded the Governor of West Java to instruct Bupatis to “rationalize” the tea market by allocating sales of tea leaves to certain factories. The instruction was clearly protectionist for a local interest and advantaged Nusamba over its competitors, whether

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*Natural Resources*. 504 U.S. 353 (1992) (region law in effect permitting counties to ban in-county disposal of out-of-county waste invalid).

<sup>5</sup> *Maine v. Taylor*. 477 U.S. 131 (1986) (region law banning importation of out-of-region baitfish upheld because of danger they posed to native species).

<sup>6</sup> *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Hunt v. Washington Region Apple Advertising Comm'n*, 432 U.S. 333 (1977).

local or more distant. At the same time, it allowed Nusamba to act as a monopsonist, permitting it to determine prices to tea leaf sellers.

*Reserving the local market to in-region parties and other forms of restriction on business entry.* There should be an *antiembargo rule*: Regional regulations designed to curb or limit the export of local products to insure adequate local supplies should be invalid.<sup>7</sup> For example, export taxes to force local processing of cashews or cocoa beans, or regulations requiring local processing should be unlawful. Such taxes and regulations serve only to restrict trade in favor of local interests while injuring producers and consumers. Similarly, regions should not reserve the sale or use of natural resources to in-region residents. The natural resources within a region are a part of the national wealth and national economy. Reserving such resources to locals would be inconsistent with the principles of nationhood and a national free trade union. Regions, of course, do have conservation interests, but should serve them by means other than discrimination against interregional commerce in the resource.<sup>8</sup>

*Requiring in-region processing of exports.* In order to generate business and employment within their borders, regions may sometimes require that products harvested within the region also be processed or partly processed within the region before being shipped out. South Sulawesi apparently requires that cocoa beans and cashew nuts be processed within the region. This regulation has a deleterious trade effect because the export market wants unprocessed beans and nuts. The regulation also favors local processors by protecting them from out-of-region processing. Finally, it injures local farmers by limiting the market for their products. Limiting the demand means that local processors can pay less for a given amount of supply. Because such protectionist actions limit trade and preclude competition, they are injurious to the national, as well as local, economy, and should be invalid.<sup>9</sup>

*Local benefits not provided to outsiders.* While regions should not regulate interregional commerce to advance local interests over outside interests, local legislatures may nonetheless wish to provide local interests with some benefits that may give them a competitive advantage over outsiders. *Example:* Suppose a region wishes to advance small businesses by subsidizing them or providing them with useful services. Given the tie between local governments and local citizens, localities should be able to subsidize in-region producers and residents while not providing similar subsidies to nonresidents.<sup>10</sup> In other words, a region should be able to benefit its residents by providing them assistance, but not by harming non-residents. While there is a favoring of local residents over outsiders, governments of localities that aim at serving their own residents should be able to provide the residents with some services not given to everyone at large. A government's willingness to use its revenues to advantage its citizens over outsiders is

<sup>7</sup> *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949).

<sup>8</sup> *Hughes v. Oklahoma*, 441 U.S. 322 (1979). *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

<sup>9</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

<sup>10</sup> *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988).

not a negative thing, and, if they wish, other regions may act similarly.

*Reciprocity requirements.* Regions could enact regulations that condition the sale of imported goods on the exporting region's agreement to allow sale of the importing region's similar product in the exporting region. While such requirements seem merely to enforce free and equal trade, they may actually interfere with commerce and should be invalid. *Examples:* If region A, for proper health or safety reasons, bars importation of *unsafe* milk from region B, region B cannot in turn bar importation of *safe* milk from region A in order to force region A to accept its milk.<sup>11</sup>

*Reciprocity, mutuality of taxation and subsidies:* Although the net economic effect on competition may be the same, the reciprocity rule could treat efforts to aid in-region business through subsidies differently than regional efforts to aid in-region business through taxation, *e.g.*, tax credits. *Example:* If region A provides its producers with tax credits, it may not condition provision of such credits to region B producers selling within-region A on B's according similar tax credits to A's producers selling within-region B. Doing so would impose a discriminatory tax on outside producers. While a tax credit appears to operate as a subsidy, in terms of political economy, the imposition of taxes and provision of tax credits operate differently than subsidies. Taxes operate as penalties, and a tax credit as a relief from a penalty, while the provision of a subsidy is an affirmative act intending to confer a benefit.

*Regional legislation having extraterritorial effect.* Legislation has extraterritorial effect when it regulates the activities of parties outside of the geographical region governed by the legislation, a result akin to legislating in a sister region.

*Direct extraterritorial effect.* On occasion, a region may seek to protect or advance its own economy by extending its laws to outsiders in a way that protects in-region businesses from out-of-region competition. Regional laws having this kind of extraterritorial effect should be invalid. *Example:* By statute, a region establishes a minimum price for a product the in-region production and interregional sale of which is critical to the region's economic health. The aim of a minimum price law is to ensure that producers get a sufficient return to stay in business. When the region seeks to apply such minimum price law to out-of-region producers who wish to sell in-region, however, it aims at interregional commerce or trade. It also destroys any competitive advantage that the outsider's willingness to accept a lower price confers, thus protecting in-region producers from outside competition. Similarly, a regional law regulating acquisition of shares in corporations having at least ten percent of their capital and surplus in-region should be illegal as an attempt to regulate nonresident corporations.<sup>12</sup>

*Legislation aimed at an in-region market, but having interregional effects.* Laws applicable solely within a region may have effects on interregional commerce. *Example:* A law requiring that in-region producers receive a minimum price for their goods

<sup>11</sup> *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976).

<sup>12</sup> *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).



effectively requires out-of-region purchasers to pay that price. Such laws, however, apply only in-region, are not aimed at interregional commerce, treat it equally rather than discriminate against it, and should be valid.<sup>13</sup>

*Transportation regulation.* Certain aspects of interregional trade might demand a uniform rule and consequently exclusive legislation by the national DPR, but other aspects or matters, because of their local diversity, might, in the absence of national law, call for local regulation. Safety is one such matter, and this is usually of concern regarding transportation. When a regional transportation safety regulation seriously conflicts with other regions' standards and imposes a heavy burden on trade, the regulation should require a strong justification, and there should be less deference given to the regional legislative judgment about the need for the safety regulation. Suppose, for example, that a region asserted control over railroads and railroad rights of way in the region and adopted a law that required a wider gauge railroad track than that of an adjoining region. The practical effect of a law would be to stop out-of-region trains at the regional border since they could not utilize the wider gauge tracks.

*Regions as market entrepreneurs.* While regions may often seek to regulate markets, regions can also enter markets as participants, *e.g.*, as traders or manufacturers. When the region acts purely as a proprietor or entrepreneur, and not as a regulator, it should be treated just as any private party would be treated. Just as a private entrepreneur may decide which parties to deal with, a region acting as entrepreneur may favor its citizens over others. Furthermore, as region citizens are members of the region's political community, they are entitled to benefit specially from region activities - as long as the region does not, in conferring benefits, effectively regulate outsiders or discriminate against nonresidents in ways inimical to national unity. Acting as a market participant, a region should be able to subsidize the activities of its citizens,<sup>14</sup> and operate a business, not amounting to a monopoly and not involving control over a substantial share of natural resources, in ways favoring citizens over noncitizens.<sup>15</sup>

A region should also be able to prefer its own residents over nonresidents in its purchases, sales, or in the distribution of its goods and properties, or opportunities it has itself created (*e.g.*, employment opportunities). *Examples:* A region could choose to purchase office equipment from manufacturers within the region. Similarly, a city undertaking public construction could require its contractors to give a hiring preference to local residents.<sup>16</sup>

On the other hand, when a region has the good fortune to have within its boundaries some nonreproducible natural resource, the rule may be different, and the region should

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<sup>13</sup> *Parker v. Brown*, 317 U.S. 341 (1943); *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346 (1939).

<sup>14</sup> *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976);

<sup>15</sup> *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980);

<sup>16</sup> *White v. Massachusetts Council of Construction Employers*. 460 U.S. 204 (1983).

not be permitted to hoard such resources for its own residents. Doing so, a region might create the kinds of division and hostility that a strong principle national unity should prevent.

Market participants as monopolists. Arguments for prohibiting regional entrepreneurial activities from favoring locals are stronger in cases where the region exercises a genuine monopoly and is therefore not competing in the relevant market. A monopoly can dictate terms to the parties dealing with it. Laws relating to monopolies often require them to deal with all qualified parties, and this should apply as well to state or regionally owned monopolies. A region, acting as a market participant, shouldn't have an advantage that a monopolizer wouldn't have. This issue is particularly important in Indonesia because Indonesia has many state-owned enterprises. Furthermore, Law No. 22 on decentralization allows regions to own and operate enterprises. For these reasons, the market entrepreneur exception should not apply in cases involving regionally owned monopolies.

## II

### Trade and Taxation Rules

#### *A.: Regional Taxation of Interregional Trade*

*Regional taxation and trade.* Regions may have some taxing authority, particularly regarding trade transactions. In fact, in Indonesia, local governments generally have not been allowed to tax income or assets. For this reason, in the past, taxes on trade became a major tax base for local governments. With increased local authority, such taxes will likely remain a significant source of revenue. But local taxes on trade can seriously distort and discourage it.

Governments do need revenue, and reasonable taxes on trade are appropriate. Problems arise in two areas, however: (1) taxes on through-trade; and (2) discriminatory taxes. By through-trade, I mean trade passing through a locality or region and having some destination other than the locality or region. If each locality or region through which trade passes has authority to tax it, then there is a likelihood of multiple taxation on the same trade. Multiple taxation, if cumulatively severe, distorts prices and injures consumers. At some point the tax burden may become so great as to cut off trade.

For example, prior to deregulation, cattle traders in South Sulawesi had to pay exorbitant taxes. "In Kab. Bone, a cattle truck on its way to market in Ujung Pandang had to stop and pay 31 different taxes and levies. Of these, 6 were legal taxes but 25 were illegal. The sum paid represented about 4% of the farm gate value of the animal, worth \$365. A typical tandem-trailer truck loaded with 18 head of cattle headed from Bone to Ujung Pandang had to be prepared to pay \$228 in taxes and levies before reaching market five hours later."<sup>17</sup> Note that this example deals with multiple intra-regional taxes. If such

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<sup>17</sup> Roger Montgomery et al., *Monitoring the Regional Implementation of Indonesia's Structural Reforms and Deregulation Program 7* (1999).

trade passes through more than one region, and if each region exacts its own taxes, the destructive effect on trade is evident.

While allowing appropriate taxation of trade, there are ways to protect against the dangers of multiple taxation. Here are some suggestions:

- A national law defining the maximum amount of tax that can be collected by any single jurisdiction (region) on through-trade. Presumably, the tax would be set at a sufficiently low rate so that the sum of cumulative taxes on through-trade would not be overly burdensome.
- Create a national tax on trade, most likely on the basis of a percentage of value; collect it at a central point; and then apportion it to the regions through which the trade traveled, on the basis of distance traveled. Such a system would be administratively complex, but at least would have the simplicity of one, rather than multiple, taxing authorities.
- Authorize traders to challenge tax exactions before some body that has the authority to review local taxes on trade and decide whether they are consistent with the principle of a free trade union. In cases involving multiple taxation, by different regions, of the same trade, the body could follow a rule such as the following. For the taxation to be lawful, it must be on activity having a substantial connection with the region, be fairly apportioned, not discriminate against interregional commerce, and be fairly related to services the region provides. This test would take into account not only the particular taxation at issue, but also other tax laws, regulations, or practices that together define the actual net effect of the taxation.

*Tax discrimination:* There should be a rule that regions must evenhandedly tax trade originating in-region and out-of-region. Disparate taxation disadvantaging out-of-region trade should be illegal. *Examples:* Sales and transfer taxes imposed on in-region events, such as the delivery or transfer of stocks following sale, which are less for in-region sales than for out-of-region sales, in effect, would impose a penalty on out-of-region sales and would discriminate against them.<sup>18</sup>

*Out-of-region impact:* As long as a region tax treats parties in-region the same way it treats out-of-region parties, it does not discriminate even if it falls predominantly on parties out-of-region.<sup>19</sup>

*Compensating use taxes:* Compensating use taxes that subject imported articles purchased out-of-region to a tax equal to a sales tax imposed on goods bought within the region should be lawful. Although it is possible to construe such taxes as protective tariffs, they equally tax articles used within a region, whether produced locally or

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<sup>18</sup> *Boston Stock Exchange v. Region Tax Comm'n*, 429 U.S. 318 (1977).

<sup>19</sup> *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (Montana severance tax on coal, applied equally to in-region and out of-region purchasers, constitutional although ninety percent of coal mined shipped out-of-region).

imported.<sup>20</sup> While removing some competitive price advantage for goods purchased out-of-region, such taxes do not advantage in-region producers or sellers by removing all out-of-region advantages.

*Subsidies:* As stated above, there may be a significant difference between a regional subsidy and a regional tax exemption, although the financial effect may be the same. Regions may subsidize domestic industries, but a tax that discriminates against interregional trade amounts to an improper regulation of it.

*Market analysis:* In determining whether a regional action, such as a tax, discriminates against interregional commerce, it is important to examine whether the region is regulating similar interregional and intra-regional businesses differently. If the interregional and intra-regional businesses serve different markets and do not compete with one another, the region may be able to justify its differential regulation.

### ***B.: Regional Taxation of Foreign Commerce***

As foreign commerce is of great concern to the national government, e.g., only the national government enters international trade agreements, the national government should take special care to protect foreign commerce from local taxation. Local tariffs and local imposition of non-tariff barriers to trade can interfere directly with the nation's international obligations, and there are foreign policy implications whenever a locality taxes foreign commerce. In this respect, Indonesia should develop some sort of import-export rule that prohibits regions from imposing tariffs or duties on imports and exports, and on the activities of importing and exporting, and also prohibits regions from creating non-tariff barriers to trade not sanctioned by the central government.

## **III**

### **Rights of Citizens**

*Rights of Indonesian citizen regional non-residents.* In the interests of creating national unity there should be some principle that regional governments cannot discriminate against Indonesian citizens, who are regional nonresidents, in matters fundamental to interregional harmony. Local preferences and discriminations can destroy the sense of belonging to a common national enterprise that is a distinguishing sentiment of citizenship. This is particularly true in countries like Indonesia where there are many different ethnic groups and where ethnic and religious conflict is, unfortunately, common. The law must, therefore, impose and defend some strong baseline principal of equality between citizens nor matter what their place of origin within Indonesia.

At a *minimum*, the principle should protect the following protected privileges or rights to:

- (1) own, possess, and dispose of property;

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<sup>20</sup> *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

- (2) engage in gainful employment or business in the private sector;
- (3) do business on terms of substantial equality with region citizens;
- (4) travel through and within a region, including the right to change residence from one region to another;
- (5) be treated equally by justice institutions;
- (6) seek medical care.

A region should not be able to treat a non-local citizen different from a local citizen in any of these areas unless the region has a substantial and legitimate reason for the different treatment. In effect, the region should have to show that the non-local citizen is a part of the problem that the region is attempting to solve. For example, a regional law requiring private employers to give local residents a hiring preference discriminates against non-locals in employment and should not stand. On the other hand, a region may be able to charge higher nonresident fees, say for a fishing or hunting license, than it charges residents. In matters of importance, the rights of Indonesians, as citizens of Indonesia, must trump the authority of local governments to favor their own local citizens over other citizens of Indonesia. To do otherwise would only encourage separatist tendencies and create hostility, conflict, distrust of government, and disbelief in the ability of government to secure the rights of citizens.